Petition

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-1935

THOMAS MCGRATH, Petitioner
against
STATE UNIVERSITY OF NEW YORK
AT PLATTSBURGH, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Thomas McGrath prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

QUESTIONS PRESENTED

1. Whether the opposition clause of Section 704(a) of Title VII, 42 U.S.C., Section 2000(e)(3) shields employees from retaliation only if the practice they challenge is found to violate Title VII.

2. Whether, consistent with this Court's standard for "fraud on the court," the courts below, on grounds of procedural limitations, may sanction an altered copy of a University Staffing Plan, which in unaltered form was previously enjoined by the Public Employment Relations Board's decision sustaining an improper employment practice complaint

3. Whether, consistent with this Court's holdings that leave to amend should be freely given, the courts below may refuse to join a party on the grounds that the case was scheduled for trial, when such amendment motion was prompted by discovery evidence, would have insured that a necessary party was joined and that the court had jurisdiction to try the entire complaint.

4. Whether actions brought in federal court under Title VII of the Civil Rights Act are subject to res judicata because of state adjudication, or is the federal court plaintiff entitled to a trial de novo.

5. Whether, consistent with the First Amendment and with principles established by this Court, the courts below may sanction a State policy forbidding a litigant from direct communication with University' employees.

6. Whether a Federal Court can, and is under obligation to enjoin a University Plan which, inter alia, denies employment rights to women and minorities even when the plaintiff bringing the action is a Caucasian male.

7. Whether, consistent with the Federal Rules of Civil Procedure, when a pleading is grounded on events subsequent to the entry of judgment, as in this case, the courts below may rule that the entry date is controlling.

LIST OF PARTIES

All parties appear in the caption of the case in the Court. However, Petitioner alleges, and sets forth in Point VII of his argument herein, that College President Joseph Burke is a proper party-defendant and should be joined.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, not officially reported, appears in the Appendix hereto (A2). It affirms the decision of the United States District Court for the Western District of New York, not reported, which dismissed Petitioner's Rule 60 (b)(3) motion as untimely. Such order, appended hereto,(A1) sanctioned an employment recommendation letter regarding Petitioner, signed by S.U.N.Y. at Plattsburgh President Joseph Burke, and placed on file at the University to be sent to others inquiring as to Petitioner's record of employment at the College. Further, and more importantly, the Order sanctioned an affirmative action flexibility plan for the University (hereinafter plan) which had previously been rejected by the Public Employment Realtions Board as violative of the University Trustees' Policies and the Negotiated Collective Bargaining Agreement

between the State of New York and the United University Professions, Inc. (hereinafter UUP), Collective bargaining representative, pursuant to the Taylor Law of New York State, for professional employees of the University. The PERB action ensued as a result of an improper practice complaint filed against the formulation and implementation of the plan, by the UUP.[1]

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code, Section 1254 (1). The order of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on November 20, 1981, which similarly was the date of such judgment. The time allowed by law for filing the petition for writ of certiorari was extended to April 19, 1982 by

1 D. Ct. Dct #116, Affid. R. Arnold , Terms & Cond of Emplymnt Chmn, UUP, Aver 33.
Aplnt's main brf, 2d cir,p.30

Supreme Court Justice Thurgood Marshall in an Order dated February 9, 1982. The District Court order and the order of Mr. Justice Marshall are appended hereto (A1)(A3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I of the United States Constitution provides:

> "Congress shall make no law... abridging the freedom of speech ... or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

42 U.S.C., Section 1981, Equal Rights Under the law, provides:

> All persons... shall have the same right... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of

> all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."

42 U.S.C., Section 1983, Civil action for the deprivation of rights, provides:

> "Every person who,under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen... to the deprivation of any rights or privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title VII of the Civil Rights Act of 1964, as amended, 1972, 42 U.S.C., Section 2000 e-2 provides:

> "It shall be an unlawful employment practice for any employer - (1) to fail or refuse to hire or to discharge any individual with with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status

> as an employee, because of such individual's race, color, sex, religion, or national origin."

42 U.S.C., Section 2000 e-3(a), Title VII of the Civil Rights Act of 1964, as amended, 1972 provides:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

STATEMENT OF THE CASE

A. The Factual Background

1. Petitioner, a Caucasian male Assistant Professor at S.U.N.Y., Plattsburgh, after six years exemplary service, was recommended for both promotion and tenure by the appropriate committees and officers of the University based upon the gender and race free criteria set forth in the Trustees Policies and the Collective Bargaining Agreement between the State and UUP.

However, on June 5, 1973, the College President dismissed Petitioner from employment and simulataneously made his review of such dismissal "hopefully" contingent upon the preparation of a plan containing separate tenure lines for women, minorities, and Caucasian males.[2] Such plan was to provide assurance to the President that the faculty ratio in the Education Division, during the period 1973-1984, was to be at least 50% female, 12% minority, and a maximum of 67% on tenure by the year 1981.[3]

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2 D Ct Dct#18, Unansw. Req for Admis Aplnt's main brf, 2d Cir, p.8

3 Id

2. Professor McGrath was assigned by the deans to assist in the formulation of the plan. The Faculty Senate Faculty Affairs Committee and the UUP called such an employment practice as an action of holding faculty appointments "hostage" to the development of a plan in violation of the race and gender-free provisions of the Trustees' Policies and the bargaining Agreement.[4] They refused to so participate. The UUP and the faculty denied tenure filed grievances, alleging violation of Article XLII of the Agreement which provided, inter alia:

> All University policies, procedures, and rules not covered in the Faculty Handbook or this Agreement having relevance to members of the negotiating unit shall be conveniently available in the library of each campus.[5]

3. At a meeting to formulate the plan, faculty were listed in separate

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4 D.Ct Dct#40, Affid. R. Arnold, aver 20-22
Aplnt's main brf, 2d Cir, p11

5 D. Ct Dct#41, Deft's Ans. to Interr, aver 7
Aplnt's main brf, 2d Cir, p10

gender and racial categories. Prospective faculty were similarly listed. It was evident that it was not statistically possible to formulate the specified plan without projecting the dismissal of Caucasian males and without projecting for employment during 1973-1981, only women and minorities. Further, in order to reach the maximum 67% of faculty on tenure by 1981, it was also necessary to place a tenure quota on the faculty (women and minorities) projected for employment. To accomplish this, the plan was to contain the provision that:

> "No faculty appointed between 1974 to 1980 would be granted tenure or reach tenure until the 65.1% predicted for 1980 is reached."[6]

Professor McGrath and Dean Heming, at this meeting, engaged in a heated debate about the legality of such action since

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6 D. Ct. Dct# 60, Affid. R. Arnold, aver#19

such a tenure quota plan, by dismissing Caucasian males and placing a tenure and promotional limiting policy on the women and minorities clearly violated the Agreement. Moreover, McGrath claimed that by participating in the action he was placed in an untenable professional situation.

Therefore, he informed the ad hoc committee that he considered their action illegal and dismissed himself from the meeting.[7]

4. On July 10, 1973, Professor McGrath was notified that his grievance was denied for the reason, inter alia, that the employment practice complained of did not constitute new policy. Also, on July 10, 1973, unknown to McGrath and the UUP, until July, 1974 when President Burke submitted it to the Human Rights Division in truncated form, the Dean had submitted the plan to the Presi-

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7 D Ct Dct#38, Plntf's Affid Spt of Dec Jdgmt Aplnt's brf to 2d Cir, pl4

dent. In addition to the tenure quota provisions, the plan contained the following statement from the Dean:

> "Herewith is our response... Further, it seems appropriate that if and when a policy re tenure quotas is forthcoming that it be applicable only to those faculty employed after the adoption of such a policy ..."[8]

As noted in the plan "those faculty employed after the adoption of such policy" were projected to be minorities and women and such a policy is clearly violative of the University's Affirmative Action Plan submitted to federal agencies to comply with federal executive orders.

5. On August 15, 1973 Professor McGrath, under the pressure of the above-cited employment actions offered to resign from the College. The next day he was summoned to the then Vice-President Burke's office where the resignation offer was withdrawn on the

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8 D Ct Dct#41 Answ to Interrog, para #18 Aplnt's main brf, 2d Cir pl2

advice of Dr. Burke who stated that he was "optimistic" that the plan would be accepted. On August 20, 1973, Professor McGrath, requested from Dr. Burke, a leave of absence for the following academic year, should he be granted tenure. Dr. Burke instructed him to work out the details of a leave with Dean Heming.

On August 22, 1973, Professor McGrath was recommended by the President for a continuing appointment (tenure),[9] and by letter to Dean Heming, dated August 24, 1973, McGrath requested a leave of absence for the following academic year.[10]

By letter dated August 28, 1973, Dean Heming, the principal author of the plan, and the individual in conflict with McGrath during the formulation thereof, denied the leave request and McGrath was again dismissed from employment. [11]

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9 D Ct Dct#8, Unans. Req for Admis
Aplnt's main brf, 2d cir p. 15

10 Id,

11 Id,

6. Professor McGrath and the UUP again filed grievances through the collective bargaining process against the Dean's dismissal of McGrath. The grivance was denied without a hearing on the grounds that McGrath was no longer an employee of the college privileged to the grievance procedure therein. McGrath's and the UUP's continued attempts to elicit a hearing were futile so he filed a complaint with the State Division of Human Rights and with the EEOC, pending the state determinations, on May 30, 1974.

The state division dismissed the complaint without a hearing, Ass't. Attorney General Cream's affidavit to the district court claiming the conduct of such a hearing in support of his res judicata motion, notwithstanding.[12]

At a conference conducted by the division, President Burke submitted a truncated

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12
D Ct. Dct#136, Plnt. Affid spt. of Rule 60(b) mtn. aver. 57-59

copy of the July 10, 1973 plan, without the word "DRAFT" printed thereon as policy of the University. On the basis of the record established at the division conference where no witnesses were allowed on behalf of McGrath, including the disallowal of Professor Arnold, Terms&Cond. of Employment Chairman, UUP, Plattsburgh Chapter. The grounds were that he filed an improper practice complaint against the University alleging the same violations as in the McGrath matter, the State Appeal Board affirmed the division's dismissal of the complaint. Assistant Attorney General Cream's affidavit to the District Court that such witnesses were allowed, in support of his res judicata motion, notwithstanding.[13] McGrath, pursuant to the New York State Executive Law, had the New York State Appellate Court review the agency determinations and that court

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13 Id

affirmed the determinations of the state agencies. Similarly, on the basis of the state agency records, and without conducting a conference or a hearing the EEOC dismissed the complaint and issued a "right to sue letter" on May 12, 1976.

7. During the period when the complaint was pending before the state agencies and the E.E.O.C., Professor Keeler, former College Department Chairman, informed both Professor McGrath and Terms and Conditions Chairman, Professor Arnold that McGrath should continue in self-employment for the reason that references from SUNY' administrators would be unfavorable due to his action of opposing the formulation of the plan.[14]

Subsequently, Professor Keeler informed a prospective employer that Professor McGrath has a good "Irish" temper at times. Prior to McGrath's

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14 D Ct Dct#60, Affid of Prof. Arnold, aver. 59-63

opposition to the plan formulation, Professor Keeler, in letters to prospective employers, "unreservedly" recommended McGrath's candidacy.[15]

B. The Proceedings

1. This action was commenced in the United States Disctrict Court for the Western District of New York by the Petitioner herein against the State University of New York at Plattsburgh, on August 11, 1976, within 90 days of the right to sue notice. The jurisdiction of the District Court was invoked under 42 U.S.C. 2000 e et seq., Section 1981 and Section 1983, under 28 U.S.C. 1331 and under the doctrine of federal pendent jurisdiction. Petitioner sought, along with other relief, a judgment enjoining the affirmative action

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15 D Ct Dct #15, Amended compl,para 49

plan for flexible staffing and declaring the procedures underlying its formulation consitutionally infirm. Defendant's argued that there was no basis in the federal rules for such a motion and the Court denied it as procedurally improper.

Defendant's litigation was carried out by its Affirmative Action Officer, Victor OValle, by its President Joseph Burke, and by Assistant Attorney General Douglas Cream.

Defendant filed several motions, including one to set aside its default and be allowed to answer the complaint. Assistant Attorney General Cream's affidavit to set aside the default and his answer to the complaint were premised on defendant's insistence of the existence of an August 16, 1973 version of the plan and on the premise that the earlier versions of the plan previously at issue before the Public Employment Relations

Board and the state bodies, were in fact, merely drafts not representative of the University policy on affirmative action flexibility. These premises were maintained by the University and its counsel throughout the proceedings and in answers to Petitioner's discovery requests, and several motions for relief.

To support this premise, Assistant Attorney General Cream also filed a copy of the July 10, 1973 document, in answer to Petitioner's request for documents, in the District Court with the word "DRAFT" clearly printed thereon.

When previously at issue before PERB and before the state bodies, and in fact presented to those bodies by President Burke, the July 10th document did not have the word "DRAFT" thereon nor was it so represented by President Burke.

Professor McGrath's Pleadings

As noted hereinbefore, during the proceedings in the District Court which consumed approximately four years, both the Petitioner and Respondent filed and argued numerous motions and discovery requests. Petitioner, basing his complaint, his litigative and discovery strategy on the basis of the evidence submitted by the parties at the State proceedings and the E.E.O.C. was doomed to failure at the outset.

Based upon Respondent's pleadings, that there was an August 16th plan in which policy was made by the President, Petitioner moved to join Joseph Burke as a party-defendant.
The court denied the motion on June 11, 1979 on the grounds that the case was scheduled for trial (Appendix A9 hereto).

In an order dated August 3, 1979, the District Court also denied Petitioner's

motion to enjoin the University from further implementation of the plan.

Petitioner had applied for a position at the Plattsburgh College in response to an ad therefor in the New York Times. He did not wish to have his application reviewed in terms of the plans at issue before the court wherein he was precluded from fair consideration by the tenure quota set forth therein and by the projection therein of only female and minority faculty. The court's denial of the motion was grounded on the basis that Petitioner was not seeking "to preserve the status quo of the instant action, the operative facts having occurred in 1973-74, but is attempting to commence another law suit concerning events in 1979."[16]

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16 D Ct Dct #123, Order, page 5
Aplnt's main brf, 2d Cir, pp38-40

Petitioner's motions to enjoin the State's policy of denying him direct communication with employees of the University were denied by the courts below, in orders dated July 16, 1979 and November 20, 1981, Those orders are herein appended as Appendices A10; and A2 Petitioner's application for an injunction on this matter was denied by United States Supreme Court Justice Thurgood Marshall on April 8, 1982, and is appended hereto, (A8).

The University's Pleadings

Subsequent to all its pleadings based upon the existence of an August 16, 1973 version of the plan and upon its pleading that the earlier versions of the plans were, in fact, drafts, and not the University's policy, and in view of the Second Circuit's decisions in Sinocropi v. Nassau County, 601 F2d 60, that

res judicata bars an employee from bringing a Title VII or Section 1981 claim after he has litigated the same claim in state court, defendant moved to dismiss the complaint on the basis of the prior record before the state court and state agencies. The District Court bound by Sinocropi, supra, dismissed the complaint insofar as it related to the denial of tenure.[17]

Petitioner's Rule 60 (b)(3) affidavit in support of motion sets forth approximately 45 of Respondent's pleadings which were based upon the existence of the never-produced August 16, 1973 version of the plan and upon the premise that the July 10, 1973 document was, in fact, a draft copy, and on other false premises.[18]

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17 Id, page 10

18 D Ct Dct #136
Aplnt's main brf, 2d Cir, pp42-50

Stipulation to Settle the Case

As noted above, Petitioner's litigative and discovery strategy during the four years of litigation in the District Court, based as they were on evidence presented by the parties prior to the District Court action, were rendered a fatal blow by defendant's insistence on the existence of an August 16, 1973 document probatively different from the documents previously at issue. Petitioner's witnesses, Terms and Conditions of Employment Chairman Professor Arnold who had attended the PERB hearing along with Petitioner and others, and who had opposed the implementation of the plans at the College and in a brief to the State Human Rights Appeal Board and to the State Court, on the directions of the UUP, was similarly oriented to the versions of the plan upon which Petitioner structured his litigative strategy. Professor Ralph Gabrielli, former Chairman of the Univer-

sity faculty committee that rejected the plans and upon whose recommendation the Education Division faculty rejected such plans,[19] was similarly oriented. In his affidavit he swore that the plans that his committee rejected had a tenure quota and restrictions on minorities and women faculty projected for employment and that his committee reviewed such plans during the 1974-75 academic year, well after August 16, 1973 and that no such August 16th plan was involved in their deliberations.

The pleadings in petitioner's complaint, numbered 9, 16-17, 19-33, 35-37, 43-44, 46, 50-51, 54, 56-64,[20] and his 9/22/76 interrogatories, numbered 4-6, 13-19, 23-28, 41, 47, and 56[21] were all based on the records established below.

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19 Dc Dct#39, Affid. Dr. R. Gabrielli
20 DC, Dct# 1,2,4
21 DC, Dct#7

Having failed to develop the essential evidence during the discovery stages and by the various motions made to compel discovery during four years of attempts in the District Court, and unable to pursue the theories upon which his case was based, Petitioner agreed to enter into a stipulation to settle the case. Such stipulation filed on October 11, 1979[22] provided, inter alia, that Respondent would furnish an employment recommendation letter objectively setting forth a statement of Petitioner's employment record at the University, subject to his approval, and that Respondent would instruct its employees to adhere to Title VII with regard to inquiries about Petitioner.

From October 11, 1979 to March 24, 1980 the parties were unable to agree to the contents of such a letter and therefore,

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22 DC, Dct #130 Appended hereto, A5

agreed to seek suggestions from Judge Elfvin in attempt to resolve the issue. Judge Elfvin's suggestions were based upon the record established at the state court, that an acceptable plan was formulated by the University enhancing employment opportunities for women and minorities and that Petitioner refused to assist in its formulation. The record established during the four years action in the District Court was set aside and not factored into the content of the letter. Petitioner did not concur with Judge Elfvin's suggestions and reported that the letter was not acceptable., Respondent accepted verbatim the suggestions and formulated the letter thereon, dated March 24, 1980.

During April and May, 1980, in correspondence with Judge Elfvin and Respondent Petitioner communicated his disapproval

of the contents of the letter and requested Judge Elfvin to enter an official order in the District Court so that he could appeal the decision, based upon the defendant's failure to hnor the terms of the stipulation and upon the misrepresentations that made possible the formulation of such a letter.[23]

No order was forthcoming from Judge Elfvin and Petitioner filed a Rule 60(b) motion March 23, 1981, within a year of the date (March 27, 1980) that Dr. Burke sent a copy of its completed letter to him. In an order, dated June 2, 1981 the District Court denied the motion as untimely, and the Second Circuit affirmed the judgment of the District Court in an Order dated November 20, 1981.

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23 Appellant's Reply Brief- Sec. Circuit

Argument

I. THE DECISION'S BELOW ARE INCONSISTENT WITH DECISIONS OF THIS COURT DEFINING THE SCOPE OF THE FRAUD UPON THE COURT CLAUSE OF RULE 60 (b).

This Court's consistent practice of making its own independent evaluation of the grounds upon which lower courts adjudication of constitutional claims are based compels the granting of this petition. See, e.g. Blackburn v Alabama, 361 U.S. 199, and Jaffa, "Judicial Revue: Constitutional and Jurisdiction Fact," 70 Harv. Law Review, 953 (1957).

Here, the Public Employment Relations Board and the state and federal courts reached irreconcilable conclusions as to what facts the record discloses and consequently on the constitutionality and statutory legality of critical sections of the affirmative action flexibility plan

of one of the nation's largest universities. The PERB read the evidence presented to it,concerning such plans, by the UUP and by the University, pursuant to an improper practice complaint, as showing that the University was engaged in an improper employment practice. As a consequence thereof, University' legal staff agreed to instruct University' officials to desist from any further implementations of such plans.[24]

The state and federal courts in the matter of McGrath v. SUNY, Plattsburgh, for reasons cited below, reached a diametrically opposite conclusion by legalizing such plans and the employment decisions stemming therefrom, inculding the recommendation letter at issue in the instant complaint.

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24 D Ct Dct#116, Affid. T&C Chmn, Prof Arnold aver 32-34.
Aplnt's main brf, 2d Cir, p30

The reasons for the different and irreconcilable judgments, though not complex, are multifaceted. The PERB and the federal and state courts did not review the same record, with regard to the formulation and implementation of such plans.

In arguing its case before PERB, University' counsel were bound by the documents the University formulated and attempted to have endorsed by the UUP and other faculty groups.

UUP' officials, including its Terms and Conditions Chairman, Professor Arnold who had brought the improper practice complaint on behalf of UUP, attended the PERB conference on the matter. Thus, only official, unaltered documents and verified employment actions were addressed.

The State Court, reviewing the human

rights agency' determinations had no jurisdiction to review employment contract violations, thus, it was bound by the evidence developed during the human right's conference on the matter, July 8, 1974. That evidence included a July 10, 1973 document which was Part I of a two part document, entiled," Plan for Continuing Appointments for Division of Education." Such document was submitted to the human rights agencies by College President Burke. Part II of such document was not similarly submitted, nor were Petitioner or the UUP aware of it until it surfaced during discovery in the District Court on August 24, 1978.

A review of the record clearly reveals University legal counsels' two strategies- One for the state proceedings, the other for

defending its plan in the federal court to ensure continued implementation. University officials had failed through the collective bargaining process and through their faculty committee structure to get their tenure quota plan endorsed. Professor Arnold put the UUP position in perspective:

> "As said chairman it is clear to me and it was clear to the executive board... who asked me to represent Professor McGrath, that ... not only did your deponent and the UUP refuse to participate in the preparation and acceptance of such plans, but we categorically rejected such invidious employment actions and the discriminatory and illegal plans devised by and endorsed by S.U.N.Y. administration."[24A]

As clearly set forth in the following pages, University' officials, including the President, the Affirmative Action Officer, and legal counsel attested to one pattern of evidence at the state and another in

24. A DCDct#60, Affid R. Arnold, Exh I, aver #69

the federal court where the elements of proof were different:

To the New York State Human Rights Appeal Board, echoing President Burke's testimony to the Human Rights Division, SUNY, Attorney Joseph Bress claimed, candidly:

> "Without Appellant's participation the Dean Submitted a flexibility plan for tenure in the Education Division to the President on July 10, 1973." [25]

However, only a truncated version of the July 10, 1973 plan was submitted to the state agency. Part II thereof, clearly vindicating Appellant's allegations was withheld.[26]

Again, echoing its state agency argument, SUNY' legal counsel informed the state court reviewing the agency determination:

> "Appellant was invited to participate in the formulation of the President's review of plans... He walked out...claiming it was 'illegal.'

25 DCt, Doc #136, Affid T. McGrath, aver #34
26 Id. aver 33

> The Dean subsequently submitted a plan for the Education Department on July 10, 1973. One of the plan's recommendations was that all faculty previously recommended should be so appointed."[27]

Petitioner, via interrogatory in the District Court, inquired of the Respondent:

> "State whether or not the Dean submitted plans for the Education Division on July 10, 1973 to the President."[28]

In direct contradiction, Affirmative Action Officer OValle, swore:

> "The document submitted by the Dean on July 10, 1973 was the first of three drafts of a plan eventually submitted to the President on August 16, 1973. The July 10, 1973 document, in fact, represents more an expression of views than a substantive response to the charge of the June 5, 1973 memorandum."[29]

Again via interrogatory, Petitioner asked:

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27 Id, aver #31
28 Id, aver #34
29 Id, aver #35

> "State whether or not that one of the plan's recommendations in the July 10, 1973 plans was that all faculty previously recommended for continuing appointment should be so appointed."[30]

Again, in direct contradiction to the record established during the state proceedings and during the EEOC proceedings, Affirmative Action Officer OValle swore:

> "Again, the July 10, 1973 document does not represent the plan as requested and eventually submitted in final form on August 16, 1973."[31]

Petitioner and Terms and Conditions Chairman Arnold, the UUP, the Education Division Faculty had debated and opposed the plans in several forums including PERB, the state agencies, the state court and no such August 16th plan had surfaced, therefore, Petitioner requested Respondent to file it in the federal court.

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30 Id. #36
31 Id #37

In response thereto, Assistant Attorney General Cream, responded:

> "Pursuant to your request I enclose the following documents:
> 1. July 10, 1973 memo from Dean Heming to President Angell.
> 2. Draft #2, Plans for Flexibility in staffing, etc.
> 3. Plans for Flexibility in Staffing, etc."[32]

The documents enclosed, the Attorney General's statement notwithstanding, were not pursuant to Petitioner's request. No August 16, 1973 plan was enclosed, and no Draft #2 was submitted. Instead, such filing included the July 10, 1973 document previously submitted to the state and to PERB, but now with the word "DRAFT" clearly printed thereon. Additionally Part II of the July 10, 1973 document, previously withheld from the agencies and

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32 Id, aver 116

from the grievance procedure was sent, disguised as "Draft #2." The third document, dated August 14, 1973 clearly set forth the tenure quota, the restrictions on a few identifiable white males and the minority and women faculty - the basis for the PERB, Faculty Union, and Faculty Committee's refusal to endorse such plans.

Affirmative Action Officer OValle clearly knew that the July 10, 1973 document, in its entirety, and the final version of the plan were in violation of the Affirmative Action Plan submitted by SUNY to federal agencies pursuant to federal executive orders and directly in violation of the Trustees Policies and the Agreement as the faculty union's improper practice complaint revealed.[33]

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33 Id, aver #41

Mr. Cream's affidavit, dated August 24, 1978 reveals that both he and Mr. Ovalle knew there was no August 16th plan with employment provisions probatively different from the plan rejected by PERB, UUP, and the Education Division Faculty.[33a] As noted previously herein, Mr. Cream's letter to Petitioner, in response to a motion to compel, claimed that he had furnished such a plan to Petitioner. Yet, Mr. OValle, in a letter to Mr. Cream dated August 22, 1978, stated, inter alia, that he could not locate the August 16th plan, that the records now indicate that the final version of the plan was submitted to the President on the 15th.[33b]

Professor Arnold, again, tried to assist the court and set the record clear:

> "...(M)y February 15, 1978 affidavit to this Court in support of

33a DCt Dct#59
33b Id, Exh II

> Plaintiff's motion notes that the 8-14-73 and the 8-15-73 versions of the plan have the same provisions concerning tenure quotas and restrictions on minorities and women as are set forth in plaintiff's amended complaint and in his interrogatories to defendant."[33c]

Yet, on December 15, 1978, approximately 3 months after informing Mr. Cream that he could not locate the August 16th document, in response to an Order from the United States Magistrate to answer portions of Plaintiff's interrogatories dated September 22, 1976, Mr. OValle again claims:

> "The plan was not submitted in final form until August 16, 1973. The Dean did not make policy in these matters, but only submitted recommendations in the form of a plan. Policy is made by the President."[33d]

33c DCt Dct # 60, Exh I, Affid R. Arnold, aver 22
33d DCt Dct #136, Affi-d T. McGrath, aver 182

Terms and Conditions of Employment Chairman, Professor Robert Arnold, in an attempt to set the record straight in the District Court, swore:

> "6. C. Victor Ovalle's sworn statement to this Court, dated 30th of January 1978, paragraph 15, that 'the July 10, 1973 document does not represent the plan as requested and eventually submitted in final form on August 16, 1973' is not consistent with my knowledge of the issue and I was personally involved in the employment actions both as a faculty member and as the Terms and Conditions of Employment Chairman." [34]

Professor Arnold, as previously noted was charged by the UUP to bring the improper practice complaint to PERB. His affidavit further sets forth:

> "7. No plan of August 16, 1973 was ever presented to the faculty

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34 D Ct, Dct#60, Exh I, Affid R. Arnold, aver #6

> or to the faculty union although the faculty committee chaired by Professor Gabrielli and involving the faculty in several meetings, was not constituted until well after such August 16, 1973 date."[35]

Since it was clearly evident that University officials were basing employment decisions on the provisions of the plan rather than upon the negotiated collective bargaining agreement, the UUP was forced to file an improper practice complaint to protect the collective baraginging process. Professor Arnold's affidavit reveals some of the UUP' grounds:

> "...(D)uring...1974 I was asked ... to formulate my sabbatical leave request in terms of the ...Plan that I was officially provided with by Associate Dean Nitzschke was dated 8-14-73."

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35 Id, aver #7

Page 6 of said 8-14-73 plans which I received on or about September 26, 1973 as official policy from Associate Dean Nitzschke states, in pertinent part, very clearly:

'No faculty appointed between 1974 to 1980 would be granted tenure or reach tenure until the 65.1% predicted for 1980 is reached.(Exh.1 hereto attached.'

As noted herein, I did not see any plan of August 16, 1973, hence for me to accept a ... leave on the basis ofa plan which violates the employment rights of the women and minority group faculty projected for employment between 1974 to 1980 would cause me to violate the Trustees Policies and tobe thereby subject to dismissal from employment pursuant to Article XIV, Title D, Section 1 (which states clearly):

'The services of members of the academic staff may be terminated at any time for cause, which shall consist of... violation of these policies...'" [36]

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36 Id, avers. 19, 20, 21

Professor Arnold further reveals the untenability of the assignment of Petitioner to assist in the formulation of such plans as a condition for "hopefullY" rescinding the President's decision to terminate him:

> "Professor McGrath, plaintiff herein, in terms of the Faculty Union's interpretation of the employment contract would have been in violation of the law had he consented to participate in the formulation of plans contrary to the terms and conditions set forth in the employment agreement and in the Trustees Policies.
>
> We reiterated our position on the legality of the employment agreement (in a Newsletter): 'UUP's position is that any change in the Board of Trustees Policies or in SUNY procedures relative to any terms and conditions of employment requires formal negotiations with UUP.' (underscoring in original).
>
> The Newsletter further states: ' Be it known... that individual professional staff who participate in any activities which modify or seek to modify... the Agreement are in violation of the law since SPA/UUP is 'the

> exclusive representative for collective negotiations with respect to salaries, wages, hours, and other terms and conditions of employment for employees.'"[37]

The Public Employment Relations Board decision rejecting such plans presented to them by the UUP and by University officials and legal staff, confirmed Professor Arnold's and the UUP's position. Again Professor Arnold's affidavit is instructive:

> "36. The UUP, Plattsburgh Chapter, instructed your deponent, as Terms and Conditions of Employment Chairman to attempt to get such plans for flexibility voided as contrary to public policy on the grounds that we construe such plans and the employment directive underlying them to be in violation of the Taylor Law, the Trustees Policies, and Title VII of the Civil Rights Act."[38]

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37 Id, avers. 32, 33, 34,
38 Id, aver #36

President Burke's employment recommendation letter formulated pursuant to the agreement to settle this case, rather than "objectively setting out the defendant's assessments as to plaintiff's abilities..." constitutes a continuation of the scheme to implement an improper affirmative action flexibility plan and to retaliate against Peti - tioner. Such letter is not based upon the findings from the PERB wherein University' legal staff asserted that they would instruct University officials from any further implementation of the plan. Rather, it is based upon the records from the state agencies and the EEOC, records which the State Attorney General's Office and the College Affirmative Action Officer, have repudiated.

In pertinent part, such letter falsely informs prospective employers that Professor McGrath is a dissident to the exemplary

cause of enhancing employment opportunities for women and members of minority groups:

> "...the (P)resident requested that the College's several deans prepare a plan projecting faculty tenure from 1974 to 1980 with emphasis on procedures relative to continuing appointment of faculty that would assure opportunity of new people including women and members of minority groups. Mr. McGrath's tenure recommendation, along with those of five colleagues was held in abeyance pending such review.
>
> The Dean... asked Mr. McGrath to participate on a faculty committee to prepare a plan projecting faculty appointments in his department. Because of Mr. McGrath's opposition to the preparation of the plan, which he sincerely thought was an unlawful affirmative action program that would impact adversely on male Caucasian faculty, Mr. McGrath refused to participate on the faculty committee and subsequently resigned from employment at the College... Such a plan was accepted by the College. Had Mr. McGrath remained in the employ of the College, he would have been granted tenure.

> The above represents the official position of the College regarding Mr. McGrath's service and reasons for leaving its employment. Any written or oral statements to the contrary are not indicative of such position."[39]

President Burke inserted the last paragraph of the letter after refusing to do so earlier when the prior text reflected the PERB finding per Petitioner's denied request, and not the state court decisions upon which Judge Elfvin's approval of the letter are based. The PERB, UUP, Faculty actions rejecting such employment practice, clearly set forth in the District Court record were give res judicata effect.

Thus, any written or oral statements contrary to Dr. Burke's version will be discarded by prospective employers. Further, other and honest statements would be made by faculty at the risk of retaliation.

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39 Appended hereto, A 12

Even subsequent to its formulation of the employment recommendation letter Respondent legal staff continue a two strategy assertion of the facts. In a brief to the State Human Rights Appeal Board, dated August 10, 1981, approximately 15 months after the date of the letter, Sanford Levine, University Counsel and Vice-Chancellor for Legal Affairs, set forth, inter alia:

> "Although recommended for tenure, the appellant voluntarily submitted his letter of resignation on August 17, 1973."[40]

In direct contradiction, the letter states:

> "Had Mr. McGrath remained in the employ of the College, he would have been granted tenure."

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40 p.2, Brief for Respondent

The uncontroverted fact is that only the criteria from the Trustees Policies and the bargaining Agreement, not from plans formulated outside that framework and rejected by the PERB, could legally be applied to tenure decisions of SUNY' faculty.

Respondent's litigative strategy coordinated by its officials, legal counsel, and the State Attorney General's office, prevented the grievance machinery, the state and federal courts from reviewing facts and evidence to objectively determine Petitioner's Fourteenth Amendment Due Process and Civil Rights claims. This Court recently stated in Logan v. Zimmerman Brush Co, _U.S._, 50 LW 4249 that a cause of action is a species of property protected by the 14th Amendment Due Process Clause.

More importantly, such litigative strategy prevented the courts from declaring the plans at issue herein, repugnant to public policy expressed in the negotiated collective bargaining Agreement and in the United States Consitution.

The record clearly shows that the Petitioner's invocation of the part of the rule allowing for an action on the basis of "fraud upon the court" was well-founded and pursuant to the Advisory Committee Notes on the Rules. Such Committee notes to the rule made reference only to Hazel-Atlas Glass Co. v. Hartford Empire Co[41] as an instance of a proper use of this method of relief.[42]

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41 322 U.S. 238 (1944)
42 Advisory Commietee, Draft 84, 1946

In Hartford the Circuit Court denied relief, inter alia, on the grounds that ... "the fraud was not newly discovered... and it lacked power to set aside the decree of the District Court because of the expiration of the term..." The United States Supreme Court reversed, holding that, even if Hazel-Atlas were guilty of latches and due diligence, the judgment must be vacated.[43] Justice Black pointed out the differences between "fraud on the court" and fraud of an ordinary nature:

> "This matter does not concern only private parties. These are issues of great moment to the public... Furthermore, tampering with the administration of justice in the manner indisputably shown here involves more than an injury to a sinle litigant. It is a wrong against institutions set up to protect and safeguard the public,

43 id at 246-7

> institutions in which fraud cannot be tolerated consistently with the good order of society."[44]

Justice Black further stated that Hartford could not claim either that the article in question was immaterial evidence or that it was substantially accurate:

> "Truth needs no disguise. This article even if true, should have fallen or stood under the only title it could honestly have been given - that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators."[45]

The courts below misapplied the Supreme Court's standard on the distinction between ordinary fraud and "fraud

44 Id at 246
45 Id at 246-7

upon the court." The affirmative action flexibility plan at issue here, as the UUP's improper practice complaint demonstrated, does injury to the entire process of collective bargaining. Additionally, the employment recommendation letter falsely informs prospective employers that Petitioner is unable to distinguish between an improper affirmative action program that adversely impacts Caucasian males and one that does not so impact, yet enhances employment opportunities for women and minorities. Not a small consideration when Petitioner seeks educational positions, consistent with his certification, in agencies bound by affirmative action plans, and determined, as is Petitioner to honor such plans.

II. Conflicting Views on Whether Conditions Opposed Must Constitute a Title VII Violation

For reasons cited throughout this petition it is contended that the letter at issue constitutes a continuing violation of Petitioner's Title VII and constitutional rights. In Shedhadeh v. Ches. Tel Co. the court said, rlevantly:

> "...(F)ormer employees could be severely handicapped in their efforts to obtain jobs if the prior employer should brand them as 'informers' when references are sought."[46]

There are conflicting views on whether the conditions opposed must have been found to be a Title VII violation. The Ninth Circuit indicated differing views holding that opposition is protected only if the opposition is found unlawful[47] and, contemporaneously, holding that opposition should not be chilled

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46 595-F2d 711 (1978)
47 Silver v KCA (9th Cir,1978)586 F2d 138

by fear of retaliation if no violation is found.[48] The Third Circuit held in Novotny v. Great Amer. Savings that the scope of Section 704(a) protection extends beyond that "embodied in participation in Title VII proceedings.[49] This Court has not yet decided the scope of the opposition clause.

III. Important Principles of Law in the Area of Affirmative Action, of Topical and pervasive public significance are Involved in the Decisions Below:

The UUP and the Petitioner's refusal to participate in affirmative action plans contrary to the Trustees Criteria are actions supported by this Court's ruling in Teamsters v. U.S. wherein it was held that a collective bargaining agreement, free from discriminatory purpose, as is the one at issue here is bona fide and enforceable.[50]

48 Sias v City Demo Agency (9th Cir 1978*)18FEP 981
49 (3d Cir, 1978) 584 F2d 1235
50 52 L Ed. 2d 396

With the proper facts before them, the Courts below would have refused, as did the PERB, to enforce an employment plan which is contrary to public policy. They would have issued Orders which would eliminate the effects of such a plan and would bar like employment actions in the future.[51]

IV. The Res Judicata Effect of the State Proceedings

As set forth throughout this petition, Respondents repudiated the state and EEOC record and evidence when it was not friendly to its purposes, and pleaded res judicata in the wake of the Second Circuit's ruling in Sinocropi v. Nassau County.[52]

The Circuit Courts are split on whether Title VII claims are subject to res judicata because of state adjudication. The Second Circuit held that they are, others they are not and that state ju-

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51 Alexander v. Gardner-Denver Co, 415U.S. 36
52 601 F2d 60 (1980)

dicial review is narrow in scope and subject to procedural limitations.[53]

V. The Issue of Petitioner's Standing to Assert the Rights of Women and Minorities in His Pleadings

Respondent and its legal counsel, by more than 45 false pleadings, including that of the existence of an August 16, 1973 plan free of a tenure quota on the minorities and women projected for employment during 1973-1984, misled the courts below into dismissing the pleadings based on such discrimination.[54] The District Court Judge, though citing this Court's holding in Trafficante v. Metropolitan Life Ins. Co.[55] did not apply it here. In Trafficante, the Court held that two tenants one black, one white, had standing to sue, alleging that their landlord discriminated against nonwhites.

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53 Smouse v. G.E. Co., (3rd Cir, 1980), 23 F.E.P.732
54 D Ct Dct #136, Affid. T. McGrath-
55 409 U.S. 205

As set forth throughout this petition the facts show that if Petitioner agreed to participate in the formulation of the plan as a basis for continuing employment at the University, it would have been at the expense of the rights of others, including women and minorities. The District Court's Order denying such standing, prevented Petitioner from presenting the entire theory upon which his case was premised.

VI. The Courts Below Erred in Basing Their Dismissal Orders On the Entry of Judgment Date

The Courts below dismissed Petitioner's Rule 60 (b) motion as untimely based upon the October 5, 1979 date the stipulation was entered into.[56] Assuming arguendo, that the fraud alleged did not rise to the level of fraud upon the court, the motion was grounded on events subsequent to

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56 DCt Dct #140.

the entry of judgment, including that of a continuing violation of Petitioner's civil and constitutional rights, and involving an employment recommendation letter received by Petitioner on March 27, 1980 for his approval. According to Moore,[57] when a motion is grounded on events subsequent to the entry of judgment, of course the time of occurence of such events is pertinent. He also states that when a stipulation is induced by fraud, or contains terms which have not been complied with by another party, plaintiff may make a motion to vacate under Rule 60 (b)[58]

Those standards were not applied by the courts below in the instant case.

VII. President Burke is a Proper Party and Should Have Been Joined

McGrath's affidavit in support of motion and his brief to the Second Circuit set forth

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57 J. Moore, Fed Pract,-7J.Moore Sect 60.27 (1981 ed)
58 Id at Sect. 41.02 , Aplnt's main brf 2d Cir pp33-34

the required proof to add President Burke as a party-defendant, i.e., he was served with a summons, he attended the state proceedings, submitted the July 10, 1973, non-draft labelled Part I section of the plan and withheld Part II, signed the letter at issue, was liable under 42 U.S.C., Sect 1981-83. Affirmative Action Officer OValle's affidavit claimed that the policy at issue was made by the President. Ass't. Attorney General Cream claimed that it was questionable whether or not the faculty handbook and the Trustees Policies constituted mandatory instructions to faculty. The tenure quota is an ongoing violation of Title VII and the employment Agreement.[59]

The District Court denied the motion to join Dr. Burke on the grounds that the case was scheduled for trial. This Court

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59 DCe Dct 136, Affid T. McGrath, aver 108 Aplnt's main brf 2d cir, pp38-40

ruled in Forman v. Davis[60] that leave to amend should be freely given. The courts below did not apply that standard here, particularly when such joinder would have both assured that a necessary party was added and that the courts had jurisdiction to try the entire complaint.

VIII. The Policy of the State of Denying Petitioner Direct Communication With Employees Should be Enjoined

The courts below denied Petitioner's motion to enjoin the State's policy of (a) denying him direct communication with College employees and (b) requiring all such communication be made through the Office of the Attorney General. The District Court denied such motion by ruling motion denied, endorsed on McGrath's motion papers.[61]

Mr. Thurgood Marshall, Justice of the Supreme Court also denied Petitoner's application to have such policy enjoined.[62]

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60 371 U.S. 178
61 DCt Dct #122a appended hereto , A10
62 Appendix hereto A5

This Court recently, in Gulf Oil Co. v. Bernard said that orders limiting speech and rights of parties must be carefully drawn.[63] Such a policy of the State prevents Petitioner from freely communicating with UUP' officials and others who are seeking to discuss their present allegations that the plan at issue here is also causing current violations of their employment rights.[64]

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: April 16, 1982
San Antonio, Texas

Respectfully submitted,

Thomas McGrath, Petitioner

63 _U.S._,49 U.S. Law Week 4604

64 Phone communie McGrath & Prof Arnold approx April 1, 1982

Appendix

APPENDIX

Page

OPINIONS BELOW:

Order, U.S. District Court, W.D.N.Y., dated June 2, 1981 Denying Plaintiff's Rule 60 (b)(3) Motion..... A1

Order, Second Circuit, Affirming Denial of Rule 60 (b) (3) Relief..... A2

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Stipulation and Order, U.S. District Court, W.D.N.Y. dated October 11, 1979..... A5

Order, United States Supreme Court, dated April 8, 1982 Denying Petitioner's Motion to Enjoin State's Communication Policy..... A8

Order, U.S. District Court, W.D.N.Y., dated June 11, 1979, Denying Plaintiff's Motion to Join Joseph Burke as a Party-Defendant..... A9

APPENDIX

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Order, U.S. District Court, W.D.N.Y., dated July 16, 1979 Denying Plaintiff's Motion to Enjoin State's Communication Policy..... A 10

Letter of Recommendation from Joseph Burke, President, SUNY, Plattsburgh, dated March 27, 1980..... A 12

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS MCGRATH, Plaintiff
v.
STATE UNIVERSITY OF NEW YORK AT PLATTSBURGH,
Defendant.

CIV -76-362

ORDER

The plaintiff has moved this Court, by affidavit sworn to on the 19th day of March, 1981, for an order pursuant to Rule 60 (b) (3) of the Federal Rules of Civil Procedure.

On October 5, 1979, the plaintiff stipulated to a voluntary dismissal of his action, with prejudice, pursuant to Rule 41 (a)(1) (ii) of the Federal Rules of Civil Procedure.

Accordingly, the plaintiff's motion is untimely and is hereby denied.

Dated: Buffalo, New York
June 2, 1981

John T. Elfvin

United States District Judge

Filed June 2, 1981

APPENDIX A1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS MCGRATH,
Plaintiff-Appellant
v
STATE UNIVERSITY OF NEW YORK 81-7469
AT PLATTSBURGH,
Defendant-Appellee

ORDER

Thomas McGrath appeals from an order entered June 2, 1981, in the District Court for the Western District of New York (John T. Elfvin, Judge), denying a motion for relief pursuant to Fed. R. Civ. P. 60 (b)(3). The motion was filed March 19, 1981. It seeks relief on grounds of fraud from an order entered October 5, 1979, dismissing with prejudice McGrath's suit against the State University of New York.

Since the Rule 60 (b)(3) motion was filed more than one year after the order sought to be vacated, it was properly denied as untimely. Moreover, the motion is entirely without substance. Most of the allegations made in support of the motion and renewed on appeal are simply renewed efforts to set forth claims in McGrath's

original 1976 lawsuit, which was settled by stipulation. The label "fraud" may not be used to revive that suit. Nor can McGrath secure reopening under Rule 60 (b)(3) by complaining about various rulings made by the District Court prior to the stipulation settling the suit.

The order denying relief under Rule 60 (b)(3) is affirmed.
Filed November 20, 1981

Hon. J. Edward Lumbard
Hon. Walter R. Mansfield
Hon. Jon O. Newman
Circuit Judges

SUPREME COURT OF THE UNITED STATES
No. A-701

Thomas McGrath, Petitioner

v

State University of New York
at Plattsburgh

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 19, 1982.

(s) Thurgood Marshall

Associate Justice of the
Supreme Court of the
United States

Dated this 9th
day of February, 1982

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS MCGRATH,
Plaintiff,

v.

STATE UNIVERSITY OF NEW YORK AT PLATTSBURGH,
Defendant.

CIV-76-362

STIPULATION AND ORDER

WHEREAS, plaintiff has commenced an action in the United States District Court for the Western District of New York alleging that certain of his constitutionally protected rights have been violated by the defendant, and

WHEREAS, the plaintiff and the defendant desire to enter into a stipulation amicably settling the claims of the plaintiff, and,

WHEREAS, the defendant admits to no wrong-doing of any description,

NOW, THEREFORE, it is

STIPULATED, by and between the parties hereto that the above-entitled action is settled upon the following terms and conditions:

1. The defendant is aware of the fact that any person, including the plaintiff,

has the right to bring an action in good faith against his employer on matters affecting the employee-employer relationship, that the bringing of such action may have no bearing on the capabilities of that employee to perform his duties, and that, specifically in this case, the fact that plaintiff has commenced this lawsuit has no bearing or relationship to his capabilities.

2. The defendant will furnish a letter to the plaintiff, signed by a responsible officer of the defendant, objectively setting out the defendant's assessments as to plaintiff's abilities, based upon its experience with the plaintiff during the period of his employment. Such letter shall be subject to his approval.

3. In the event of any request to the defendant for references relative to the plaintiff, including any application for employment to the State University of New York, the defendant will send such letter above-described in response thereto.

4. The defendant will make no reference to the existence of this lawsuit in

commentary on the plaintiff's qualifications and will direct that no employee of the defendant will make any reference to this lawsuit or to the plaintiff's pursuit of administrative remedies before the State Division of Human Rights, directly or indirectly, to any prospective employer.

5. The defendant recognizes its obligation not to discredit plaintiff's professional and personal reputation on account of his having asserted his rights administratively and judicially and will instruct its employees that they are to comply in all respects with the spirit of this settlement as well as with Title VII of the Civil Rights Act of 1964.

6. Plaintiff consents to the dismissal of this action with prejudice and without costs or attorney's fees.

7. The defendant will make no application to the court for its costs or attorney's fees.

Dated: 10/5/79 (s) Thomas McGrath

8/24/79 (s) Joseph Burke
College President

So Ordered

Buffalo, New York 10/11/79

(s) John T. Elfvin, U.S.D.J.

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED
STATES
WASHINGTON, D.C.

April 8, 1982

Mr. Thomas McGrath
4939 West Cambray Street
San Antonio, Texas 78229

RE: THOMAS E. MCGRATH V STATE
UNIVERSITY OF NEW YORK AT
PLATTSBURGH
A-851

Dear Mr. McGrath:

Your application for an injunction in the above-entitled case has been presented to Justice Marshall, who has endorsed thereon the following:

"Application denied,
Thurgood Marshall
4/8/82"

Very truly yours,
Alexander L. Stevas, Clerk
by Katherine Downs, Ass't Clerk

cc: Carl E. Stephen, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS MCGRATH,
Plaintiff

v.

STATE UNIVERSITY OF NEW YORK AT PLATTSBURGH,
Defendant.

CIV-76-362

ORDER

Plaintiff having moved April 30, 1979 for leave to amend his complaint further by adding Joseph Burke (who is said to be the defendant's president) as an additional party defendant in his official and individual capacities, and said motion having come on to be heard before me on June 11, 1979 and plaintiff having not appeared but having submitted said motion "on the papers" and defendant having appeared by Douglas S. Cream, Esq. and opposed said motion,

NOW, THEREFORE, upon all the above and all of the proceedings and pleadings heretofore had in this case and in view of the presently scheduled trial date (August 21, 1979) and upon due deliberation, it hereby is Ordered that said motion is denied.

Dated: Buffalo, New York
June 11, 1979

(s) John T. Elfvin
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS MCGRATH, Plaintiff, v. STATE UNIVERSITY OF NEW YORK AT PLATTSBURGH, Defendant.	Notice of Motion for Preliminary Injunction CIV-76-362

Please take notice that plaintiff, Thomas MCgrath, will move the Court on July 15, 1979 at 10:00 A.M.M. for a preliminary injunction restraining defendant and the State of New York from any furhter implementation of the policy of (a) denying plaintiff or anyone acting on his behalf direct communication with employees of S.U. N.Y., and (b) requiring that all such communication be made through the office of the Attorney General, Buffalo, New York. Such policy is set forth in Assistant Attorney General Cream's letter to plaintiff, dated August 3, 1978 (cc: Hon John T. Elfvin, U.S. District Judge).

Motion ordered denied.
July 16, 1979

(s) John T. Elfvin
U.S.D.J.

The grounds for this motion are as follows:
1. It is essential for plaintiff to elicit evidence from willing employees of S.U.N.Y. in order to prepare and present the best possible case at trial.

2. Subject policy of the State of New York and the S.U.N.Y. constitutes prior restraint on expression and association in violation of the First Amendment to the U.S. Constitution.

3. Subject policy constitutes a violation of plaintiff's due process rights in that it impairs his ability to prepare his case since it exposes to unwarranted scrutiny the process by which plaintiff researches, develops, and integrates the case that he will ultimately present.

4. Subject policy constitutes intimidation since it would restrain employees who would otherwise be willing to interact with plaintiff and respond freely to plaintiff's inquiries.

Dear

Mr. Thomas McGrath was employed at Plattsburgh State University College during the period September 1967 to August 1973 as an Assistant Professor in the Student Teaching Department.

During this time Mr. McGrath carried out his responsibilities in a competent and reliable manner. He was considered a respected member of the faculty. He demonstrated a mastery of hus subject matter and possessed versatility. Mr. McGrath was well read and in working with his colleagues drew praise for his scholarly ability. In the student evaluation of his courses, organizational ability, quality of instruction, personal interest and guidance were consistently rated high and indicated the esteem in which he was held by both undergraduate and graduate students...

As a result of his abilities, Mr. McGrath was recommended for tenure in April, 1973. Shortly thereafter, then President George W. Angell requested that the College's several deans prepare a plan projecting faculty tenure from 1974 to

1980 with emphasis on procedures relative to continuing appointment that would assure opportunity for employment of new people including women and members of minority groups. Mr. McGrath's tenure recommendation, along with those of five colleagues, was held in abeyance pending such review.

The Dean of the Faculty of Professional Studies asked Mr. McGrath to participate on a faculty committee to prepare a plan projecting faculty appointments in his department. Because of Mr. McGrath's opposition to the preparation of the plan, which he sincerely thought was an unlawful affirmative action program that would impact adversely on male Caucasian faculty members, Mr. McGrath refused to participate on the faculty committee and subsequently resigned from employment at the College.

The several deans submitted a plan to the College wherein it was recommended inter alia that continuing appointment be given to faculty recommended preciously for tenure. Such plan was accepted

by the College. Had Mr. McGrath remained in the employ of the College, he would have been granted tenure.

The above represents the official position of the College regarding Mr. McGrath's service and reasons for leaving its employment. Any written or oral statements to the contrary are not indicative of such position.

Sincerely,

Joseph C. Burke
President

March 27, 1980